FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MORGAN STANLEY & CO. INCORPORATED, GOLDMAN, SACHS & CO., ERNST & YOUNG, SALOMON BROTHERS INC,

Petitioners,

v.

PACIFIC MUTUAL LIFE INS. CO.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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SUMMARY OF ARGUMENT

In its zeal to undermine two decisions of this Court, Congress has enacted a statute that reopens final judgments of Art. III courts in closed cases. This action poses a bold and serious threat to the constitutional foundation of judicial Power. Neither Pacific Mutual Life Ins. Co. ("PMLI") nor the Government can point to a single instance where a court has upheld such a law — because no such authority exists. This statute truly is the embodiment of Thomas Jefferson's "wolf" — brazen, undisguised, and ready to enter the fold.[1]

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1 In his *Notes on the State of Virginia*, Query 13, 121 (1784), Jefferson likened "unlimited powers" of the "assembly" to a wolf stalking the fold.

I. SECTION 27A(b) VIOLATES THE SEPARATION OF POWERS DOCTRINE.

A. As the Government and PMLI ("Respondents") have few, if any, decisions which even remotely support their positions, their briefs consist primarily of attempts to distinguish the authorities that Petitioners cite.[2] In particular, Respondents warp and shrink the rule of *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), limiting its holding to prohibit only the courts' acceptance of jurisdiction over disputes that are subject to pre-judgment, not post-judgment, statutes that permit the Congress to sit as a full-fledged "court of errors." But *Hayburn's Case* cannot be so limited. It holds that judgments of Art. III courts cannot "under any circumstances" be revised or suspended by non-Article III decisionmakers. *Id.* at 410 n.2. This principle applies regardless of whether the Executive or Congress actually sits as a "court of errors"; regardless of the outcome of their review; and regardless of whether their interference takes place pursuant to a pre-existing, or a post-judgment, statute.

1. In essence, the Government contends that § 27A(b) is a proper exercise of Congress' Art. I power because that statute purportedly leaves "[t]he ultimate judgment to be rendered . . . within the control of the judiciary" and makes no "case-specific determinations of the result of particular disputes." Gov. Br. 17; PMLI Br. 18; *see also* Gov. Br. 14, 17 n.12, 18, 27, 28.

But § 27A(b) is an exercise of "ultimate" power by Congress as to whether the courts' § 10(b) judgments will remain final: § 27A(b) specifically directs the vacation of duly rendered Art. III judgments and the reinstatement of claims dismissed in closed cases. Under *Hayburn's Case*, Congress

2 Petitioners incorporate by reference the Rule 29.1 statement set forth in the Petition for Certiorari.

cannot interfere with the judicial Power in this manner, any more than it can sit as a "court of errors."

A court's paramount function is to "judge": to provide litigants in particular, and society in general, with a forum for the certain, final end to disputes.[3] Section 27A(b) nullifies this "essential attribute[] of the judicial power," even if it dictates no results in particular cases. *See Northern Pipeline Constr. Co.*, 458 U.S. at 87 (opinion of Brennan, J.). *See also, e.g., Thomas* v. *Arn*, 474 U.S. 140, 154 (1985). Indeed, if the Government's position is accepted, the door is open for Congress repeatedly to vacate future judgments in any case previously closed by an Art. III court. Pet. Br. 23 & n.26.

In any event, *Hayburn's Case* forbids "suspension" or "control" of Art. III judgments, regardless of whether the "ultimate" outcome of particular cases is changed. Pet. Br. 16. "The fact that Congress did not dictate . . . a particular result . . . does not in any way negate the fact it has sought to exercise judicial power." *United States* v. *Sioux Nation*, 448 U.S. 371, 430 (1980) (Rehnquist, J., dissenting). Indeed PMLI itself notes that the principle in *Hayburn's Case* may be violated even if

3 *See* Gov. Br. 12 (judicial power "contemplates the power to render final judgments that are conclusive"); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 81 (1982) (opinion of Brennan, J.) (power to issue "final determination . . . must remain with the judge") (citation omitted); *Commodities Futures Trading Comm.* v. *Schor*, 478 U.S. 833, 853 (1984) (same); Pet. Br. 14 & n.18, 23 & n.25. *See also* 2 Story, *Commentaries on the Constitution of the United States* 422-33, 463 (3d ed. 1858) (judgments "must be conclusive" so that Congress and the Executive do not "enjoy a secure and irresistible triumph"); Lawson, *The Constitutional Case Against Precedent*, 17 Harv. J. Law & Pub. Policy 23, 30 (1994) (judicial power requires "binding judgments that are not subject to collateral challenge"); Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 Duke L.J. 279, 312 & n.108, 322-23 & n.139 (1992) (Marshall and 1802 Congress viewed finality as "indispensable" to judicial power).

"the judicial determination" would be "simply ratified" by the "executive or legislative authorities." PMLI Br. 15.[4]

Nor is it relevant that, after overturning the final judgments in question, § 27A(b) may leave with the courts the "ultimate" decision, assuming that Congress does not change the law again. The breach of separation of powers occurs when the judgment is suspended, regardless of what happens later. And § 27A(b) mandates that the courts in the reopened § 10(b) cases disregard this Court's decisions in *Lampf, Pleva, Lipkind, Prupis & Pettigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991) and *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991) — an unconstitutional restriction upon the courts' purportedly "ultimate power" upon "remand" from the Congress.[5]

2. The Government also contends, based solely on *Sioux Nation*, 448 U.S. at 371, that § 27A(b) is "no different in effect" than the enactment of a hypothetical § 10(b) statute, with an extended statute of limitations, which — the argument assumes — would be constitutional. Gov. Br. 18-20. But, regardless of its hypothetical validity, the statute the Government posits was *not* enacted. And, unlike the hypothetical legislation, § 27A(b) applies only retroactively to dismissed and closed cases. Pet. Br. 26-27; p. 8, *infra*. In any event, even if the hypothetical legislation were permissible, it does not

4. The statute in *Hayburn's Case* raised only the possibility that non-Art. III decisionmakers would revise final judgments. *See* 2 U.S. at 410 n.2; Pet. Br. 17.

5. *See Northern Pipeline Co.*, 458 U.S. at 81-83 (district court's ultimate power of review of decisions of non-Art. III tribunal insufficient because it was restricted by "clearly erroneous" standard of deference); Pet. Br. 23 & n.25. *See also Chadha* v. *INS*, 634 F.2d 408, 430 (9th Cir. 1980) (Kennedy, J.) ("supervening legislative action" that could create a "de facto revision of the Court's statutory interpretation" violates *Hayburn's Case*), *aff'd on other grounds*, 462 U.S. 919 (1983).

follow that § 27A(b) would be. "Plenary power for making laws does not import authority to revise particular administrative dispositions ... the greater power definitely does not include the lesser," because the lesser disrupts the judicial Power. *See Chadha*, 634 F.2d at 434 (Kennedy, J.); Pet. Br. 25-27.

Insofar as it attempts to override *res judicata*, the "new" § 10(b) statute hypothesized by the Government would raise serious constitutional problems.[6] Moreover, simply as a matter of statutory construction, the hypothetical statute would not be construed as reopening final judgments unless the legislation expressly so specifies. *See* Amicus Br. of Spendthrift Farm 26-27.[7] Thus, to reopen final judgments, the hypothetical

6. Even the retroactive application of court decisions is "limited by the need for finality ...; once suit is barred by res judicata or by statutes of limitations or repose, a new rule cannot open the door already closed." *Beam*, 111 S. Ct. at 2446 (opinion of Souter, J.). Thus, *res judicata* must be of constitutional dimension; otherwise it could not restrict the retroactive application of court decisions, which is required by "basic norms of constitutional adjudication." *Harper* v. *Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2516 (1993) (citation omitted).

7. Similarly, even if *res judicata* is not constitutionally based, new legislation of general applicability would not overcome *res judicata*; to do so such a statute would need to mandate specifically the nullification of final judgments. *See Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 854 n.2 (1990) (Scalia, J., concurring) (finally adjudicated cases are "placed beyond the reach of the new statute by the doctine of *res judicata*"); *Aunyx Corp.* v. *Canon U.S.A., Inc.*, 978 F.2d 3, 8 (1st Cir. 1992 (different sources of law do not defeat *res judicata*), *cert. denied*, 113 S. Ct. 1416 (1993). *See* Pet. Reply Br. In Support of Pet. for Cert. at 3 n.5; *see also* p. 19, *infra*. PMLI responds that *res judicata* does not apply to claims based upon new statutes because such claims could not have been brought at the outset. PMLI Br. 30 & n.31. This Court has implicitly rejected that contention. *See Nevada* v. *United States*, 463 U.S. 110, 119, 130 (1983) (applying *res judicata* because of factual overlap between claims despite new substantive standard in supervening executive order); 1B *Moore's Fed. Practice* ¶0.410[1] (1993) (construing *United States* v. *Southern Ute Tribe*, 402 U.S. 159 (1971), as holding that judgment under one treaty barred second suit involving same land that relied on subsequent treaty). PMLI is also incorrect in suggesting (PMLI Br. 30-31 & n.32) that a judgment on limitations grounds is not "on the merits." *See* Pet. Br. 46; p. 18, *infra*.

legislation would have to do precisely what *Hayburn's Case* forbids: specify particular judgments for legislative reversal, as § 27A(b) does. Affixing the label "new cause of action" to such legislation cannot save it.[8]

Aside from these dispositive flaws in the hypothetical statute, the notion that the Congress can undo a judgment it does not like by creating a new claim is breathtaking in its audacity and ominous in its implications. The logical chain has no end: affirmative defenses could be added or subtracted; burdens of proof could be altered; and even damages could be halved, doubled, or trebled. Such manipulation would gravely weaken the institutional integrity of the judiciary as a co-equal branch.[9]

3. The Government cites only *Sioux Nation* to support this remarkable concept. But the "legislation" in *Sioux Nation* was merely the embodiment of Congress' decision to waive its *res judicata* defense. Congress was "to all intents and purposes the defendant[]." *Sioux Nation*, 448 U.S. at 398 (quoting *Nock* v. *United States*, 2 Ct. Cl. 451, 457-58 (1867)). Unlike legislation reversing a final judgment, a defendant's waiver of *res judicata* merely forswears the affirmative use of a judgment and in no way challenges the validity of the prior judgment. *See Sioux Nation*, 448 U.S. at 401 (citing *Pope* v. *United States*, 323 U.S. 1, 9-10 (1944) for the proposition that acceptance of moral obligation does not undermine court's finding that no legal

8. The Framers specifically condemned intrusions on the judicial Power that take the form of new legislation. Pet. Br. 25 n.28. Indeed, in *Hayburn's Case*, the statute was unconstitutional even though the Government could have used the same argument that the Government uses here: that the pension legislation was constitutional because the Congress could have passed a hypothetical statute embodying new pension standards.

9. This is especially so because § 27A(b) vacates judgments and directs the courts to ignore this Court's mandate in *Beam* that *Lampf* be retroactively applied. *See Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U.S. 103, 113 (1948) (Congress and the Executive may not "disregard the judgment of the court").

obligation exists); *id.* at 431 (Rehnquist, J., dissenting); *see Schor*, 478 U.S. at 855 (non-Art. III dispute resolution by "willing parties" does not undermine judicial Power). Thus, the courts uniformly interpret *Sioux Nation* as permitting nothing more than the government's waiver of the benefit of an affirmative defense of *res judicata* based on a prior judgment. Pet. Br. 24-25.

Nonetheless, without any supporting authority, Respondents assert that *Sioux Nation* cannot be so distinguished because if final judgments are protected by Art. III, those structural considerations "would not be subject to waiver by *any* party litigant." Gov. Br. 19-20 & n.15; PMLI Br. 18 n.15. But, unlike the legislative nullification of final judgments or of the *res judicata* effect of those judgments, the government's payment of its debts carries no separation of powers implications and, thus, requires no waiver of that doctrine. *See* p.6, *supra*. In any event, structural separation of powers arguments are waivable if, as in *Sioux Nation*, they do "not call into question the jurisdiction of the forum . . . that issued the judgment." *Freytag* v. *Commissioner*, 111 S. Ct. 2631, 2647-48, 2649 (1991) (Scalia, J., concurring).[10]

B. PMLI contends that *Hayburn's Case* is based only on the prohibition against advisory opinions and, therefore, legislative reversal of a court decision is not itself unconstitutional. According to PMLI, *Hayburn's Case* only forbids the court's assumption of jurisdiction over a claim that, at the outset, is subject to later extrajudicial review. PMLI Br. 13. According to PMLI, as §27A(b) was enacted after the judgment at issue in this case, *Hayburn's Case* does not apply because the lower

10. *See also Sampeyreac* v. *United States*, 32 U.S. (7 Pet.) 222, 238-39 (1833) (cited in Gov. Br. 14 & n.9) (upholding overturning of state court judgment found to be void because it was in favor of a fictitious person, but stating that if Sampreyreac "was a real person, and appeared here, setting up this objection, it might present a different question").

court had a "live case or controversy" at the time the judgment was entered. Apparently, it matters not that § 27A(b) was later passed and voided the judgment, so long as the court had the privilege, at some point, of rendering what it thought was a final decision. No authority supports this point (*see* Pet. Br. 23, 25-27); numerous decisions construe *Hayburn's Case* as fully applicable to legislation enacted *after* the entry of a final judgment (*see* Pet. Br. 19 & n.23, 26 & n.29); and the theory leads to results that can only be described as absurd.

To begin with, a post-judgment statute, such as § 27A(b), is just as destructive of a court's right to decide cases or controversies as a pre-existing law. The former merely works its mischief after the fact, thereby wasting the time of the court and the litigants, as well as violating the Constitution. As a constitutional matter, Congress can no more create a case and controversy out of claims that have been finally dismissed in accordance with this Court's rulings than it can sit as a "court of errors." Thus, contrary to PMLI's position (Br. at 16), an act of interference taken by another branch of the government *after* final judgment also renders the prior judgment advisory, in violation of the case and controversy requirement. *See Town of Deerfield* v. *FCC*, 992 F.2d 420, 427-29 (2d Cir. 1993).

PMLI's position also fails because it would produce the anamolous result of invalidating legislation directed to future judgments, which creates only the "potential" for non-Art. III revision at the time of judgment (PMLI Br. 14), while upholding legislation such as § 27A(b) that *actually* revises past Art. III judgments. *See Plaut* v. *Spendthrift Farm, Inc.*, 1 F.3d 1487, 1493 (6th Cir. 1993). Such an outcome cannot be reconciled with the proper function of a legislature — to "look to the future." Pet. Br. 27 & n.30; *see Harper*, 113 S. Ct. at 2523 (Scalia, J., concurring) (legislation is prospective and adjudication retrospective).

More fundamentally, while some applications of *Hayburn's Case* turn on the prohibition against advisory opinions, *see* Gov. Br. 26, PMLI Br. 15,[11] that fact does not undercut the central underpinning of *Hayburn's Case*: the need to safeguard the "judicial Power" of Art. III courts. *See* Pet. Br. 16 n.21 (citing Nowak & Rotunda and Corwin); Amar, *On Lawson On Precedent*, 17 Harv. J. Law & Pub. Policy 39, 42 (1994). Indeed, the "judicial Power" of Art. III resides principally in the power to issue "judgments." If Congress may revise or ignore Art. III judgments — in the words of Justice Jackson, refuse judgments "full faith and credit," *Chicago & Southern Air Lines*, 333 U.S. at 113, — then the "judicial Power" of Art. III is compromised, if not eviscerated. Thus, *Hayburn's Case* forbids *any* revision or control of final judgments by non-Art. III decisionmakers "in whom no judicial power of any kind appears to be vested." 2 U.S. (2 Dall.) at 413 n.2.[12]

Accordingly, PMLI errs in asserting that the legislature may revise final judgments at will and that *Hayburn's Case* only forbids the courts from assuming jurisdiction over a case that at the outset is subject to such revision. PMLI Br. 13. Instead, this Court has condemned not only the unconstitutional assumption of jurisdiction, but also post-judgment attempts to "revise" or

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11 The fact that some of these cases involve the decisions of non-Art. III tribunals is irrelevant. The critical point is that extra-judicial review is inconsistent with the judicial Power. Thus, *Chicago & Southern Air Lines* held federal court review of an agency decision unconstitutional because the court's decision would, in turn, be subject to executive review. 333 U.S. at 112-14.

12 The First Congress also believed that the law in *Hayburn's Case* had been found unconstitutional because it "render[ed] the Judiciary subject to the Legislative and Executive powers, which ... ought to be kept carefully distinct." Annals of Cong. 556-57 (J. Gales ed. 1792) (quoted in Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 Duke L.J. 561, 593 n.104 (1989)). These views of the First Congress are accorded deference. *See Bowsher* v. *Synar*, 478 U.S. 714, 723-24 (1986).

"overturn" judgments even if there was no preexisting "provision for executive or legislative revision at all." Gov. Br. 27 & n.22. *See United States* v. *O'Grady*, 89 U.S. (22 Wall.) 641, 648 (1874); *United States* v. *Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 400-01 (1934); *United States* v. *Waters*, 133 U.S. 208, 213 (1890).[13] *See also* Pet. Br. 19 n.23, 26 n.29 (citing numerous lower court decisions discussing *Hayburn's Case* in the context of legislation enacted after the entry of final judgment).

C. While the Government asserts that the historical record "stands for a good deal less than petitioners claim," it focuses only on a small fraction of the sources cited in the briefs of petitioners and amicus Spendthrift Farm, and in *Plaut*, 1 F.3d at 1487. Gov. Br. 22-23. The Government dwells on the Pinckney Plan, Gov. Br. 21-22, but does not deny that the Constitutional Convention rejected several other proposals that would have permitted the legislature to have control over the courts or the judicial Power. Pet. Br. 14-15 n.19; Amicus Br. of Spendthrift Farm 11 n.3. And the Framers rejected Revolutionary War practices that resulted in the reopening or suspension of judicial decisions in a manner analogous to § 27A(b). *See* Amicus Br. of Spendthrift Farm 9-10 (citing Corwin).

The Government seeks to diminish the force of Alexander Hamilton's criticism of legislative interference in judicial affairs by pointing to his observation that the Constitution does not explicitly ban such interference. But Hamilton merely noted the absence of a textual prohibition in the Constitution; he certainly did not imply that Congress had the right to usurp judicial Power. To the contrary, Hamilton wrote that legislative review of court decisions "exceed[s]" the legislative "province" and is not "authorize[d]" by "[t]he theory" of the United States, British, or state constitutions, *Federalist No. 81*, at 545 (J. Cooke ed. 1961)—obviously a viewpoint which

13. Despite PMLI's suggestion (Br. at 13 n.9), *O'Grady* and *Waters* are based on the Constitution, not statutory interpretation. *See O'Grady*, 89 U.S (22 Wall.) at 646; *Waters*, 133 U.S. at 213.

qualifies as "legislative history" of the highest order.[14]

D. Notwithstanding the Government's contention (Gov. Br. 24-25), Fed. R. Civ. P. 60(b)(6) and 28 U.S.C. § 1655 merely codify the historic power of the courts to reopen their own judgments in extraordinary circumstances — a power obviously different from § 27A(b). Neither R. 60(b)(6) nor § 1655 subjects the decisions of a court to extra-judicial review. Indeed, R. 60(b)(6) does not mandate anything; it merely permits the courts, in their discretion, to exercise their judicial Power to reopen judgments under narrowly circumscribed conditions, free from legislative interference. Pet. Br. 49.

Similarly, § 1655 merely defines when certain judgments involving lien enforcement become truly final, permitting the reopening of those decisions during a one-year period. In constitutional terms, this one-year waiting period is not conceptually different from other generally applicable prerequisites for finality, such as the 30-day waiting period during which a losing party is allowed to file an appeal with the Court of Appeals.

In any event, both R. 60(b) and § 1655 are "[r]ules regulating matters indisputably procedural" and are thus "*a priori* constitutional." *Burlington Northern R.R. Co.* v. *Woods*, 480 U.S. 1, 5 (1987). Such pre-existing procedural rules applying neutrally to all cases comport with the "long-recognized power of Congress to prescribe housekeeping rules for federal Courts." *See Hanna* v. *Plumer*, 380 U.S. 460, 473 (1965). But that principle has no bearing on § 27A(b), which is not a housekeeping rule, but is instead post-judgment legislation that alters the substantive outcome in particular cases.[15]

14. The "theory" of separation of powers is enforced even without a precise textual mandate. *See Bowsher* v. *Synar*, 478 U.S. 724, 725 (1986) (need for protection for separation of powers "implied in the very fact of the separation of the powers of these departments by the Constitution") (citation omitted).

15. Amicus NASCAT asserts that the avoidance of "inequitable results" justifies § 27A(b). NASCAT Amicus Br. 8-10. But the equitable argument of the pension beneficiary in *Hayburn's Case* was rejected. 2 U.S. (2 Dall.) at 410 n.2. In any event, such equitable arguments have no bearing on separation of powers. Pet. Br. 27-28.

II. SECTION 27A(b) VIOLATES THE FIFTH AMENDMENT.

A. While the point tends to get lost in the underbrush of the Respondents' rhetoric, the simple fact remains that an authoritative decision of this Court establishes that § 27A(b) violates the Constitution because "it is not within the power of the legislature to take away rights which have once vested by a judgment." *McCullough* v. *Virginia*, 172 U.S. 102, 123-24 (1898); *see Hodges* v. *Snyder*, 261 U.S. 600, 603 (1923). Purely private rights, once finally adjudicated, "become[] absolute" and are "beyond the reach of Congress." *Pennsylvania* v. *Wheeling & Belmont Bridge*, 59 U.S. (18 How.) 421, 431 (1856). Respondents brush *McCullough* aside as a relic, but point to no decision of this Court which contains the slightest criticism of *McCullough*; nor do they even attempt to respond to the dozens of Circuit and District Court decisions that applied the constitutional principle espoused by that decision. Pet. Br. 33, 39.[16]

1. Apart from contending that it is too old to be good law, Respondents' principal response to *McCullough* is the same as the Fifth Circuit's: that *McCullough* involved a statute enacted while an appeal was still pending. PMLI Br. 24-25 n.22. However, the decision in *McCullough* was final under Virginia law, Pet. Br. 30 n.34, a point which Respondents simply ignore.[17]

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16 Despite Respondents' position, *Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U.S. 338 (1922), involved a final judgment of the Florida Supreme Court and, thus, reinforces petitioners' position. *See e.g., American Fed. of Gov't Employees* v. *Reagan*, 870 F.2d 723, 726 n.20 (D.C. Cir. 1989); *Canisius College* v. *United States*, 799 F.2d 18, 25 (2d Cir. 1986) ("Canisius, unlike the *Forbes* plaintiff, had no final judgment" or other "vested right"). Additionally, numerous state courts, including recent decisions, have recognized *McCullough* as determinative. *See, e.g., Messenger* v. *Messenger*, 827 P.2d 865 (Okla. 1992); *Kirk* v. *Denver Pub. Co.*, 818 P.2d 262 (Colo. 1991) (en banc).

17 The determination of when due process protection attaches, *i.e.*, when a state judgment becomes final, is a matter of state law. *See Western Union Telegraph Co.* v. *Louisville & Nashville R.R. Co.*, 258 U.S. 13, 21-22 (1922) (looking to Kentucky law to determine whether rights had vested; due process protection did not attach until claim was adjudicated in "final and unreviewable determination").

2. *Stewart* v. *Keyes*, 295 U.S. 403 (1935), cannot be distinguished on the basis that it protects only title to land, not judgments. Gov. Br. 41 n.31; PMLI Br. 24 n.20. Due process protects intangible property. *See Tulsa Prof. Collection Servs.* v. *Pope*, 485 U.S. 478, 485 (1988). Moreover, *Stewart* involved a court-approved sale of property, constituting a final judgment that was not appealed and thus could not be vacated by a subsequent statute enlarging the prior limitations period. Pet. Br. at 32; *Stewart*, 295 U.S. at 407, 416-17. Despite the Government's contention (Br. 41 n.31), *Chase Sec. Corp.* v. *Donaldson*, 325 U.S. 304 (1945), does not undermine *Stewart*. *Chase* involved a "pending" action and the decision plainly implied that the result would have been different had the legislation deprived the defendant "of a final judgment in its favor." Pet. Br. 45-46.

3. As did the Fifth Circuit, respondents rely heavily on *Fleming* v. *Rhodes*, 331 U.S. 100 (1947). Gov. Br. 33-34; PMLI Br. 22-23, 29. Petitioners advanced several points distinguishing the case, which Respondents did not address. Pet. Br. 42-43. We would only point out, again, that, unlike the decree in this case which called for no further action by the court or the parties, in *Fleming* this Court upheld wartime legislation that blocked the enforcement of a *prospective* judgment of eviction, granted by a non-Art. III court, that had not been implemented by the landlords. Pet. Br. 42-43. *See Federal Housing Admin.* v. *The Darlington, Inc.*, 358 U.S. 84, 91 & n.6 (1958) (cited in Gov. Br. 34) (construing *Fleming* to uphold a statute that "applies prospectively only.").

4. The Government also relies on *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370 (1940); *Stephens* v. *Cherokee Nation*, 174 U.S. 445 (1899); and *Freeland* v. *Williams*, 131 U.S. 405 (1889). Government Br. 42-48; *see* PMLI Br. 29-30. All of these cases are readily distinguishable for reasons set forth in our main brief. *See* Pet. Br. 31, 40-44. In particular, while upholding the Congressional power to regulate legislative courts, *Stephens* restates the general rule that "it is undoubtedly true that legislatures cannot set aside the judgments of [Art. III] courts." 174 U.S. at 478. As the Government implicitly acknowledges (Gov. Br. 47), *Paramino Lumber* and *Stephens* also involve non-Art. III administrative decisions that created no

vested rights.[18]

Contrary to the Government's interpretation (Gov. Br. 47), the legislation in *Freeland* reopened a judgment that, despite its "prima facie" validity, created no vested rights because it was rendered "on account of acts done in pursuance of the powers of a belligerent in time of war." 131 U.S. at 417. Such a judgment was rendered "without authority of law" and was thus "voidable" by the legislature. *Id.* at 419, 420.[19] Apart from the Fifth Circuit decision below, *Freeland* has never been cited to nullify final judgments that fall outside of this limited context.

The Government also portrays § 27A(b) as serving the "same role" as the law in *Paramino Lumber*, which lifted a time bar so that a new rule of decision could be applied. Gov. Br. 45-46. But *Paramino Lumber* involved an administrative decision and relied in large measure on cases upholding legislation "to remedy mistakes in administration." *Paramino Lumber*, 309 U.S. at 378. Section 27A(b), in contrast, does not "cure" administrative "mistakes," but attempts impermissibly to overturn an "intervening right" — the final judgment of an Art. III court. Pet. Br. 41 n.43.

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18. *See* 2 Davis and Pierce, *Administrative Law Treatise* at § 13.3 (3d ed. 1994) (prior to *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 421-22 (1966), courts had held *res judicata* inapplicable to administrative decisions because such decisions were often made informally without a hearing or other procedural protections).

19. Judgments granting reparations against the government for the taking of property in the Civil War were "a matter of bounty rather than of strict legal right," which could be rescinded whenever the government so desired. *United States* v. *Pacific R.R.*, 120 U.S. 227, 237 (1887). *Cf. Kent* v. *Dulles*, 357 U.S. 116, 128 (1958) (non-wartime controversy at issue could not be "equate[d] ... with problems that arise under the war power"). *Accord United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (if the nation "has given up vested rights" in times of "great national concern," it is "not for the court but for the government" to determine compensation).

5. Fed. R. Civ. P. 60(b)(6) does not justify PMLI's position. R. 60(b)(6) was a pre-existing condition of the final judgment, not a post-judgment collateral attack. *See* p. 11, *supra*. When rendered, a judgment is subject to R. 60(b)(6) and other rules governing the execution and effect of judgments, just as land may be acquired subject to easements and other limitations. Thus, the use of R. 60(b)(6) is no more a deprivation of property than the use of a pre-existing easement across another person's property would be a trespass. Because R. 60(b)(6) partially defines the property right at the outset, its subsequent implementation cannot effect a "diminishment" of that property.[20]

B. Relying primarily upon *Campbell* v. *Holt*, 115 U.S. 620 (1885), a decision that does not permit the elimination of final judgments, Respondents mount a sweeping attack on the entire concept of vested rights, urging that it is inconsistent with "modern" due process principles (Gov. Br. 30; PMLI Br. 19). The Government concedes that "numerous" recent decisions of the court do embody vested rights principles (Gov. Br. 30-32; Pet. Br. 33-37),[21] but asserts that most of these cases involve the takings clause, not due process. Gov. Br. 32 & n.26. However, the interests protected by the due process and taking clauses coalesce, so that takings cases defining the scope and protection accorded property rights also define the protection accorded by due process: "any significant taking of property by the State is within the purview of the Due Process Clause." *Connecticut* v. *Doehr*, 111 S. Ct. 2105, 2115 (1991). *See also TXO Prod. Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2718 n.17 (1993) (forbidding " 'taking of ... property without

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20. Additionally, "the most relevant Supreme Court decisions suggest that courts," as opposed to legislatures, "are absolutely free to make such changes in property rights." *See* Thompson, *Judicial Takings*, 76 Virginia L. Rev. 1449, 1453 (1990); Pet. Br. 48-49.

21. *See also* Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 Stanford L. Rev. 69, 76 (1982) (discussing the "long and unbroken tradition of viewing the legal universe in terms of a division between interests that are formally vested and interests that are merely inchoate legal wants.").

due process' '') (citation omitted); *Kaiser Alum. Corp.*, 494 U.S. at 856 (Scalia, J., concurring) (the Constitution ''prohibits (or requires compensation for) all retroactive laws that destroy vested rights''). Thus, if § 27A(b) ''takes'' a vested property right, it follows that due process would also forbid that deprivation in the absence of just compensation. *See* p. 17, *infra*.

1. Contrary to Respondents' position, Petitioners need not show that a judgment is entitled to ''privileged'' protection. Instead, Petitioners met the applicable burden of showing that a judgment is entitled to as much protection as any other vested property rights. Pet. Br. 36-37. Respondents respond that this particular judgment is not a vested property right because petitioners essentially ''received a windfall'' (PMLI Br. 27; Gov. Br. 37-38) which may be taken subject to only the ''rational relationship'' test that applies to a claim of due process protection for an *unadjudicated* cause of action.[22]

But adjudicated rights are different. The Congress may no more second-guess the basis of rights fixed by final judgment than Congress can upset rights vested by a deed, even if either property right results from a purported windfall. Pet. Br. 47-48. Like a lien or a deed, a judgment is a ''perfected claim'' that determines ''the legal relation of the litigants,'' Pet. Br. 36, and is accorded ''comprehensive protection.'' *Id.* And this is true regardless of how the vested right was obtained; a piece of land would be protected even if, for example, a landowner had won the land the day before in a lottery and thereby received a ''windfall.''[23] Similarly protected is property transferred

22 It is irrelevant that PMLI may have a state securities law claim even if the § 10(b) claim is not reinstated. Gov. Br. 29 n.25. The judgment endows petitioners with the tangible right to relief from exposure to § 10(b) claims, *see* Pet. Br. 46-47, and it does not matter that other contingent claims with different, and more onerous, requirements of proof remain. If, in fact, the freedom from liability for violation of § 10(b) is such an ephemeral right, we invite PMLI to explain why it appealed the District Court's order declining to reinstate that claim.

23 *See Carlton* v. *United States*, 972 F.2d 1051, 1060 (9th Cir. 1992) (due process violated by elimination of tax deduction, notwithstanding the Government's argument that taxpayer should have known that deduction was ''too good to be true''), *cert. granted*, 114 S. Ct. 55 (1993); *see also*

pursuant to a court order on which the limitations period for rescission has run, and a supervening statute may not lift that bar. *See Stewart*, 295 U.S. at 417. By this same analysis, the judgment here confers a ''vested'' property right not subject to retroactive legislative divestiture.

2. Respondents also cite *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), Gov. Br. 15, 31, 32, 36; PMLI Br. 20, 23, a case which concededly did not involve a final judgment. Pet. Br. 37-39. While *Usery* permits the retroactive overturning of unadjudicated expectations, such as a party's assumption and hope that it will be free from liability based on current law, that unvested expectation receives no constitutional protection. 428 U.S. at 16. Once it hardens into a final judgment, however, a bright line is drawn and the principle in *Usery* is inapplicable, as the lower courts recognize. Pet. Br. 38-39.[24]

The Government contends, without authority, that it may retroactively cancel property rights so long as it acts rationally. To the contrary, Congress may regulate, restrict, or condition vested property rights, but it cannot do what it did here: completely eliminate a vested property right. Pet. Br. 38. *Cf. Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172, 197 & n.15 (1985) (discussing possible due process implications of ''regulation [that] goes too far'') (citation omitted).[25]

Hodel v. *Irving*, 481 U.S. 704, 715 (1987) (act which abolished right to pass on property by descent or devise was unconstitutional, although it is ''dubious'' whether owners had investment-backed expectations or reliance interest in passing on property acquired by gift, descent, or devise).

24 Regardless of bankruptcy law on judicial liens (PMLI Br. 27-28 & n.27), a judicial lien is ''a significant property interest entitled to the protections of the due process clause.'' *Verba* v. *Ohio Cas. Ins. Co.*, 851 F.2d 811, 814 (6th Cir. 1988).

25 Contrary to the Government's position, *United States* v. *Darusmont*, 449 U.S. 292, 299 (1981), shows that vested rights may not be divested subject to a showing of ''rationality.'' Additionally, despite the Government's interpretation (Gov. Br. 32 n.26), *Coombes* v. *Getz*, 285 U.S. 434, 448 (1932), precludes the retroactive divestiture of vested rights under the due process clause as well as the contract clause. Similarly, apart from statutory construction issues, *Asiatic Petroleum Co.* v. *Insular*

3. Without case authority, PMLI asserts that a judgment based on limitations grounds deserves less due process protection than other judgments because a limitations period is a matter of legislative "expedien[ce]." PMLI Br. 30-31. But while "Congress may change an established time bar . . . where the courts have *adjudged* a claim to be time-barred, Congress cannot compel the courts to reopen a settled judgment." *Plaut*, 1 F.3d at 1496. Thus, *Chase Sec. Corp.*, 325 U.S. at 310, 316, strongly suggests that judgments based on limitations grounds may not be legislatively nullified. Pet. Br. 45. Moreover, judgments based on limitations grounds are "substantive," for *res judicata* and due process purposes (Pet. Br. 45-48), regardless of the rule in the choice of law analysis. *Cf.* PMLI Br. 31 & n.32. And *Graham & Foster* v. *Goodcell*, 282 U.S. 409, 427 (1931) (cited in PMLI Br. 30) permits correction of "defects in administration," not the divestiture of vested rights such as final judgments. Pet. Br. 41 & n.43; *see* p. 14, *supra*.

4. PMLI contends that § 27A(b) is tantamount to a new claim for securities fraud with a new limitations period — a contention that fails as a due process argument for the same reasons it fails as a separation of powers argument. *See* p. 4-6, *supra*. New laws of general applicability do not eliminate the *res judicata* effect of a final judgment. *See* p. 5 & nn.6-7, *supra*, & p. 19, *infra*. More fundamentally, *Hodges*, 261 U.S. at 603-04, *Forbes*, 258 U.S. at 340, *McCullough*, 172 U.S. at 123-24, and *Wheeling & Belmont Bridge*, 59 U.S. (18 How.) at 430, all involved legislation that attempted to overturn final judgments.

Collector of Customs, 297 U.S. 666, 671 (1939), states that the statute could not "[i]n any event . . . operate retroactively to deprive the petitioners of rights vested before its adoption." And *Ettor* v. *City of Tacoma*, 228 U.S. 148 (1913) is not an anachronism because it found a due process right in a statutory cause of action. Gov. Br. 33. In fact, this Court has recently reaffirmed that "a cause of action is a species of property" protected by due process. *See Tulsa Prof. Collection Servs.*, 485 U.S. at 485 Thus, the principle of *Ettor* still stands: retroactive legislation may not "deprive one of a vested property right." 228 U.S. at 155.

Thus, merely calling a statute a "new claim" does not avoid the due process problem; a new claim may no more nullify a judgment than it may rescind a deed.

5. Finally, PMLI also contends that protecting final judgments would "perverse[ly]" punish "responsible" individuals who did not press an appeal "when no grounds existed at the time." PMLI Br. 28 Respondents also assert that the judgment that petitioners defend was a "windfall" in which petitioners have no "reliance" interest. PMLI Br. 28-31; Gov. Br. 36.

But far from being a "windfall," the judgment at issue directly resulted from this Court's decisions. Pet. Br. 47-48. Indeed, "basic norms of constitutional adjudication" in *Beam* require retroactive application of *Lampf*: the law may not "'shift and spring' according to 'the particular equities of [individual] parties' claims of actual reliance on an old rule and of harm from retroactive application of the new rule.'" *Harper*, 113 S. Ct. at 2517 (quoting *Beam*, 112 S. Ct. at 2447 (opinion of Souter, J.)). In particular, a party that makes a "'deliberate choice not to appeal'" receives no relief from judgment, despite intervening changes in law. *See Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 396, 400 (1981) (*res judicata* applies, despite change in Supreme Court precedent); *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 374 (1940) (bankruptcy plan not vacated even though Supreme Court had held bankruptcy law unconstitutional after plan confirmed). *See* p. 5 & nn.6-7, *supra*.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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